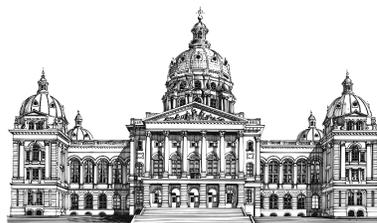


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## Prison Privatization

### ISSUE

Identification of privatized prisons in other states, the positive and negative aspects of prison privatization, and how inmate civil rights and state liability issues are handled.

### AFFECTED AGENCIES

Department of Corrections

### CODE AUTHORITY

The Code of Iowa does not prohibit the Executive Branch from privatizing functions the General Assembly has funded and authorized as activities of State agencies. It does not require the Executive Branch to submit planned privatizations or outsourcings to the General Assembly for review.

House File 2472, Section 7.1 (Justice System Appropriations Act) prohibits the Department of Corrections from entering into a contract for new privatized services costing in excess of \$100,000 without prior notification to the affected State employee organizations and the Co-Chairpersons and Ranking Members of the Joint Justice System Appropriations Subcommittee. Existing contracts may be renewed without notification.

### BACKGROUND

At the end of 1995, a survey by the National Institute of Corrections found that 10 states had privately operated prisons or had plans for privatized prisons. Another 16 states were considering private operation of prisons, and four states had considered and rejected privatizing prison operations. (See **Attachment A.**)

Iowa has two instances of fully privatized correctional services. First, medical services for the Iowa State Penitentiary at Fort Madison were privatized as part of a consent decree for the *McBride v. Farrier* case. The State contracts with Correctional Medical Services of St. Louis for complete staffing and delivery of medical services. The contract specifies staffing, treatment and pharmaceutical delivery procedures, accreditation requirements, and other details. Most of the medical care at the other state prisons is provided through contracts for services with individual physicians, dentists, and other health professionals working with state-employed nurses and technicians.

The second instance of privatization is a 48-bed residential facility for women operating in the Fifth Community-Based Corrections District. The District Department contracts for all treatment, food, educational, supervision, and other services. A probation/parole officer is on site to monitor operations.

During the 1996 legislative session, consideration was given to expanding privatized medical services to all prisons. Cost estimates shown in the following table were based on information from the Iowa Financial Accounting System (IFAS) and the Department of Corrections. The estimates were provided to the Joint Justice System Appropriations Subcommittee for consideration. The cost estimates were:

#### Inmate Medical Costs - FY 1995

	<u>Medical Costs</u>	<u>FTE Positions</u>	<u>Inmate Population</u>	<u>Cost Per Inmate</u>
<b>Ft. Madison</b>	\$ 1,557,846	0.00	890	\$ 1,750
<b>Anamosa</b>	1,109,373	14.00	1,434	774
<b>Oakdale</b>	2,064,706	32.00	942	2,192
<b>Newton</b>	389,903	6.00	314	1,242
<b>Mt. Pleasant</b>	957,934	7.00	885	1,082
<b>Rockwell City</b>	363,600	5.00	407	893
<b>Clarinda</b>	449,356	5.00	274	1,640
<b>Mitchellville</b>	518,513	7.00	302	1,717
<b>Total</b>	<u>\$ 7,411,231</u>	<u>76.00</u>	<u>5,448</u>	<u>\$ 1,360</u>
<b>Costs net of Ft. Madison(1)</b>	\$ 5,853,385	76.00	4,558	\$ 1,284

(1) Includes costs for all prisons except Ft. Madison. The cost per inmate can be treated as a system average for services that are not privatized.

If comparable contracts had been in place at all prisons in FY 1995, prison medical costs would have been \$2.1 million higher than they actually were. During the discussion with the Joint Justice System Subcommittee, Dr. Loeffelholz, Director of Medical Services for the Department of Corrections, indicated that the quality of medical service at the Fort Madison Institution was inferior to that provided by State-employed staff and contracted medical personnel at the other institutions.

#### CURRENT SITUATION

Based on interviews with Departments of Corrections and Attorneys General in states that have privatized prisons and based on a review of articles on prison privatization, one of the primary reasons to privatize prisons is to obtain cost savings. Some states (e.g., Texas and Florida) included a mandatory 10.0% cost savings over state-run operations for privatization to proceed. Arizona statutes require the same level of service at a lower price.

Primary means of obtaining cost reductions include:

- Lower personnel costs through paying lower salaries or restricting benefits. Personnel costs account for approximately three-fourths of a prison budget, so reductions in these costs can result in savings. Across the nation, fringe benefits for public workers,

particularly retirement benefits, are less for the private sector employees than for public sector employees, leading to "at least some cost savings." (Thomas, 1993:3)

The Louisiana Department of Corrections, which has five years of experience with private prisons, indicated that the private prisons cost less during the first years of operations, but as staff have been promoted beyond entry level pay grades, costs have tended to equalize among the comparable private and state prisons. States can limit contractor's cost savings ability in this area by requiring comparable staffing levels, compensation, and benefits.

- More efficient staffing, prison design, and use of technology. When a private contractor constructs the prison using state-of-the-art design and surveillance technology, staffing costs, which accounts for the majority of a prisons budget, will be less than those of older more traditionally designed prisons.
- Other cost reductions can come from not requiring the private contractors to use the state purchasing arrangements, thus allowing them to take advantage of market fluctuations.
- Exempting the contractor from going through the state civil service procedures can reduce costs. Positions can be filled more quickly and efficiently, thus holding down costs and avoiding additional overtime costs associated with working under staffed.
- Private prisons are typically not exempt from taxes. Paying property tax and sales tax can be considered a rebate to the state.
- The traditional expectation is that competition among potential contractors will hold down costs and improve efficiency and service quality. Department of Corrections officials generally recommended keeping contracts relatively short (ex. three years) to promote competition and to keep the current contractor from escalating costs.
- Some hold the perception that the private sector acts more quickly, and when prison facilities are needed, can construct and open them more quickly. Private prisons that avoid a public bidding process should be able to move more quickly into the construction phase. Contrary to this, Arizona reported the private contractor did not meet the schedules for construction and bringing the prison on-line.

Lower costs may be associated with negative effects.

- Lower salaries attract poorer quality correctional officers and other staff and encourage higher turnover. (AFSCME)
- Arizona found that the private prison originally did not hire enough staff to meet the Department of Corrections' staffing policies and requirements. The situation was remedied by the contractor hiring a former warden who brought staffing up to the required level.

Other problems and concerns dealing with cost include:

- Comparisons of private and state-run prisons are often difficult since private prisons tend to be mainly for minimum and medium security inmates, while state-run facilities must deal with all security levels. Higher security levels are associated with higher costs. There may be treatment and programming differences between private and state-run prisons. Overhead calculations may cause difficulties in comparing private and state-run prisons.

Those states requiring a cost savings may have difficulty in determining whether a savings actually occurred.

- In some cases, problem or difficult inmates are kept in the state-run system or refused by the private prison. Arizona has a procedure for transferring difficult prisoners back to the state-run prisons. Florida has a \$7,500 maximum medical cost per inmate for inmates in private prisons. Chronically ill or those with costly illnesses are returned to the state-run prisons thus shifting their medical costs back to the state.
- Private prisons, unless statutorily prohibited, sometimes import inmates from other states without the knowledge of the state in which they are located.
- When a private prison becomes operational, the state must still monitor the operations to assure contract requirements are being met, that inmates are treated according to Department of Corrections policies and procedures, and that court ordered requirements are being fulfilled. Costs will be incurred by the Department of Corrections for staff and other resources to perform the monitoring and auditing functions.
- Opponents of private prisons argue that privatization encourages the contractor to cut corners, sacrificing the inmates' quality of life, to increase profit. Proponents argue that competition will force contractors to provide the same or better quality of service, including inmate quality of life, for less cost to maintain the contract.
- The state will incur costs if it must take over the operation of a privatized prison. Contracts typically include a termination clause, and if a private contractor fails to fulfill the contract or goes bankrupt, then the state can either take back the inmates or take over operation of the prison. The state will incur costs from relocating the inmates or from purchase of the facilities, equipment, and inventory and from hiring staff.

## **ALTERNATIVES**

### **Inmate Civil Rights**

Inmate civil rights are a concern when privatizing a prison. States with private prisons have only a few years experience, but those contacted uniformly indicated that there had been no significant civil rights violations or court cases. Steps typically taken to protect inmate civil rights include:

- Having detailed contracts that include protection for inmates' civil rights. State Department of Corrections have policies and procedures which meet court requirements for protecting inmates' civil rights. The states uniformly wrote into the contracts with the private prisons that these policies and procedures would be adhered to. For example, the facilities maintain law libraries and take appropriate steps to assure inmates have access to the courts; inmate grievance procedures are in place; and use of force situations are video-taped.
- Monitoring. Departments of Corrections assign staff to the private prisons to monitor operations to insure contractual agreements are fulfilled and that Department policies and procedures are adhered to.
- Officer training and accreditation requirements. Some states specify in the contract that private prison correctional officers will have the same or similar training as those in state-run prisons. Texas requires correctional officers to be licensed through the same agency as private investigators and security officers.

- Length of stay and good time calculations done by Department of Corrections employees. Since the state cannot delegate its police powers and obligations, performing these calculations and maintaining these records permits the Department of Corrections and the state to maintain custody and authority over its prisons. The state, not the private contractor, determines when the prisoner's freedom can be returned.
- Disciplinary actions. The Department of Corrections usually reviewed and affirmed any disciplinary actions requested or taken by the private prison. This is intended to assure policies and procedures are followed and that inmates are not abused.

### **State Liability**

A second area of concern is the liability of the State for actions of the private prison. Given that incarceration of individuals involves ultimate police power of the state which cannot be contracted out, it is unclear if the state could be held liable for negligent acts by the contractor. (Attorney General, State of Tennessee)

Most states limit their exposure to liability lawsuits in three ways:

- By requiring the private prison contractor to indemnify the state against any and all claims, expenses, and liabilities arising from acts or omissions of the contractor.
- By requiring the contractor to maintain insurance (general liability, medical, worker's compensation and unemployment, fire and property, automobile) at a level sufficient to cover claims. The general liability insurance would pay for claims resulting from violations of inmates' civil rights.
- By requiring the contractor to provide legal representation and defend both the private prison and the state in case of a lawsuit. The state may be required to defend itself when the issue falls under the state's responsibility, as opposed to the contractors. For example, if the state built the prison facility and the lawsuit claimed the inmate's injury was due in part or in whole to a design feature of the facility, then the state would provide its own legal defense.

If challenged in court, the state would want to be able to demonstrate that the contract adequately applied the policies and procedures that protect inmates' rights and that proper monitoring of the contract was being done.

The state may become liable for actions by the contractor if the contractor goes bankrupt or fails to maintain the required insurance. All contacted states included provisions for termination of the contract and transfer of control and operation of the prison facility to the state. (See **Attachment B** for a detailed list of issues to consider when privatizing a prison.)

### **BUDGET IMPACT**

A number of factors affect prison privatization costs. Some of the major factors are:

- Statutory requirements. Some states have included cost reduction requirements in the legislation. They sometimes find that measuring the cost savings is difficult, due to a lack of comparability between private and state-run facilities and lack of agreement on what costs should be included.
- Physical design of the prison. Modern designs allow fewer correctional officers to supervise more inmates.

- Staffing demands, including pay scales and benefits. Private prisons with greater flexibility may use different staffing patterns to achieve greater efficiencies. The potential problem is that the alternative staffing patterns may not provide adequate security or meet policy or court requirements.
- Types of inmates assigned to the prison. Higher custody inmates cost more to supervise.
- Amount of administrative oversight required of the Department of Corrections.
- Competition. To the extent that contractors must compete with other potential contractors, costs can be reduced. When competition is lacking, the state may become dependent upon a sole supplier who can then raise the costs.

Most states using private prisons have anticipated cost savings. Very few states have comparative evaluations to clearly demonstrate if the savings was realized.

### **REFERENCES**

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Cody, W. J. Michael. Legal Opinion of the Attorney General. State of Tennessee, 1985.

National Institute of Corrections. Privatization and Contracting in Corrections: Results of an NIC Survey, U.S. Department of Justice, February 1996.

Thomas, Charles W. "Are 'Doing Well' and 'Doing Good' Contradictory Goals of Privatization?" Large Jail Network Bulletin, Winter 1993.

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Prison Privatization

Table I. Status of Privatization of Adult Prison Facilities

State	Privately Operated Prisons are in Use or are Planned	Private Operation of Prisons is Being Considered	Private Operation of Prisons has been Considered and Rejected	Private Operation of Prisons has not been Formally Considered
Alabama		X		
Alaska		X		
Arizona				X
Arkansas		X		
California			X	
Colorado		X		
Connecticut				X
Delaware			X	
D.C.		X		
Florida	X			
Georgia		X		
Hawaii		X		
Idaho				X
Illinois				X
Indiana				X
Iowa	(Privatization has been discussed; further consideration is on hold.)			
Kansas			X	
Kentucky		X		
Louisiana	X			
Maine				X
Maryland	(Information not available)			
Massachusetts				X
Michigan		X		
Minnesota				X
Mississippi	X			
Missouri				X
Montana		X		
Nebraska				X
Nevada		X		
New Hampshire				X
New Jersey		X		
New Mexico	X			
New York			X	
North Carolina	X			
North Dakota				X
Ohio	X			
Oklahoma	X			
Oregon				X
Pennsylvania		X		
Rhode Island				X
South Carolina				X
South Dakota				X
Tennessee	X			
Texas	X			
Utah	(Information not available)			
Vermont		X		
Virginia	X			
Washington		X		
West Virginia				X
Wisconsin				X
Wyoming		X		
Puerto Rico	X			
U.S. Bureau of Prisons		X		
TOTALS	11	17	4	18

## **Issues in Contracting for Prison Privatization**

The following are highlights and examples of the issues that need to be considered when contracting for privatization of a prison.

### Initiation of Privatization:

- Establishment of criteria for privatization (ex. cost savings minimum requirements, service quality, other benefits or opportunities).
- Request for Proposal procedures and selection of contractor.
- Qualifications, experience, and financial soundness of contractor.

### Facility and access:

- Construction and ownership of facilities.
- Maintenance of facilities.
- Alterations to physical plant - what is permitted, and what requires approval of State.
- Ownership and use of movable property, current inventories in case of a transfer of operations, and perishable inventory. Purchase of additional equipment and movable property.
- Length of contract and related aspects, such as, associated built-in cost increases, effects on competition.
- Office space for the State monitor, including equipment.
- Access to records and computer files and specification of contractor's proprietary or confidential information.
- Access to all areas of facilities, inmates, and staff for purposes of monitoring, auditing, and investigation of incidents.

### Operations:

- Applicability of state and federal laws, court rulings, department regulations, standards, and policies.
- Adherence to outside accreditation standards (ex. American Correctional Association).
- Security standards and inmate control policies and application, including use of force.
- Transfer and transportation of inmates - standards for assigning inmates to the private facility; what types of inmates may the contractor refuse; when and why can inmates be transferred back to State institutions; safety and security standards and procedures during transport.
- Safety and emergency procedures and standards - fire, natural disaster, riot, power failure, labor dispute or employee strike.
- Operations during a contractual dispute.
- Interface of telecommunications and computer equipment and software.
- Treatment programming (medical, dental, pharmacy, psychiatric/psychological, substance abuse, educational, vocational, family and support network facilitation/social work), monitoring and auditing, applicable standards, availability, effectiveness standards, accreditation, subcontracting.
- Staff training, accreditation, licensing, and on-going skill development.
- Exempt the contractor from state purchasing and procurement statutes and regulations.
- Food service and dietary standards, including inmate commissary availability, operations, and items offered.

- Laundry and personal hygiene supplies - inmate issued and personal clothing and personal hygiene equipment and supplies.
- Inmate mail handling, availability, and allowable expenses.
- Visitation - facilities, staffing, security, availability or timing, telephone privileges and access.
- Inmate discipline, records, access to appeals and courts, sentence computation, records maintained and availability.
- Escape - prevention, acceptable occurrences, required responses, liability for resulting injury or loss.
- Inmate work - types of work permitted, procedures and policies for work inside and outside the prison, provision of security, availability, compensation, requirements of inmates, disposition of resulting products, coordination with vocational training programs

Employees

- Hiring practices and whether current employees are to be given preference.
- Exempt the contractor from state civil service and other hiring requirements and procedures.
- Standards, accreditation, background checks.
- Orientation and in-service training requirements.
- Applicability and availability of State pay scales, sick leave, benefits packages, retirement systems, and transfer of seniority, retirement, sick leave and other benefits between contract employment and state employment.
- Employee drug testing standards and procedures.

Compensation and adjustments:

- Per diem rate establishment, annual increases, other recoverable expenses or adjustments.
- Minimum and maximum inmate populations.
- Billing procedures and resolution of billing disputes.
- Payment arrangements, per diems, calculation of overhead, options for increases to population beyond contracted levels.
- Payment of taxes.

Indemnification, insurance, and defense of claims:

- Indemnification of State from lawsuits and related liabilities - minimum insurance coverage, responsibility for providing legal counsel, and losses covered.
- Property insurance requirements.
- Notification requirements, preservation and availability of evidence, records, and staff testimony.
- Extension of sovereignty of the State in regard to lawsuits affecting the contractor and employees, and maximum exposure for contractor and/or employees.
- Failure to perform or fulfill contractual agreements and reparation options.

Default and termination:

- State default - payment schedules and definitions for non-payment, material breaches of the contract, payments or payment procedures during a dispute.
- Contractor default - failure or refusal to meet contractual obligations, notice required of State, time to respond or cure problem.

- Termination of the contract and transfer of operation to State or other contractor upon completion or termination of the contract, option to liquidate damages, transfer property, continuation or transfer of employment of staff.